IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8797 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

THAKOR JAMATSING MALSING

Versus

STATE OF GUJARAT

Appearance:

MS SUBHADRA G PATEL for Petitioner

MR SUDHANSHU PATEL AGP for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 20/10/2000

ORAL JUDGEMENT

The petitioner who has been detained under the order dtd. 8th July, 2000, passed by the District Magistrate, Banaskantha District at Palanpur, exercising the powers under Sec.3(1) of the Gujarat Prevention of Anti-social Activities Act (hereinafter referred to as

"the Act") calls the said order in question preferring this application under Article 226 of the Constitution of India.

2. The facts leading the petitioner to prefer this petition may in brief be stated. Against the petitioner, two complaints under the Bombay Prohibition Act came to be filed with Gadh Police Station and Palanpur Taluka Police Station alleging that once on 3rd May, 2000 on the basis of the information received, when the field of the petitioner was raided, near thorny hedge, a card-board box containing 45 bottles of foreign liquor to the tune of Rs.11,350/- was found for which he was having no pass or permit and thus, the complaint committed the offence under the Sec. 65(a), 65(e), 116(2) and 81 of the Bombay Prohibition Act. Thereafter, on 27th June, 2000, on the basis of the information received, when the petitioner coming from Datiwada and going to Antroli, was searched, from the dickey of his Scooter, 32 bottles of foreign liquor to the tune of Rs.5600/- were found for which the petitioner was having no pass or permit. The first complaint is pending before the Court, while investigation qua the second complaint is going on. The District Superintendent of Police, Banaskantha at Palanpur, during his visit to those police stations found that the petitioner was a headstrong person and was dealing in the liquor on a large-scale and his nefarious activities were injurious to the public health. The petitioner was the bootlegger and being the headstrong person, no one was ready to give statement against him or give evidence before the Court, as every one was worrying about his own safety. The District Superintendent of Police then found, considering the record that the petitioner being headstrong person, was required to be detained, and that was the only way out to control his activities injurious to the public order. He, therefore, exercising his powers under Sec.3(1) of the Act passed the order on 8th July, 2000, as a result of which the petitioner was arrested. At present, he is under the detention.

3. The order of detention is assailed on 2 grounds. It is the contention of the learned advocate representing the petitioner that the order is passed without application of mind. In the order it is mentioned by the detaining authority that the remedy under Sec.56 for externment was not available. It may be stated that within a period of 3 years, the petitioner has committed the offences under Sec. 65 of the Bombay Prohibition Act, and therefore, Sec.57 of the Bombay Police Act could have been invoked for the purpose of externment. Though

the remedy was available, the detaining authority has, in the order mentioned that, the said remedy was not available. The order which is passed, therefore can be said to have been passed without any application of mind. The order, therefore, on this count being untenable in law, is required to be quashed and set aside.

4. Another ground on which the order is assailed is that the detaining authority has not exercised the privilege under Sec.9(2) of the Act rightly.

5. It would be better if the law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention has been made are required to be communicated to the detenu and further an opportunity of making the representation against the order of detention is required to be given. The detenu is therefore required to be informed not merely factual inference and factual material which led to inference namely not to disclose the certain facts but also the source from which the factual material is gathered. The disclosure of sources would enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Sec.9(2) of the Act the detaining authority is empowered to withhold such facts and particulars the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has be exercised sparingly and in those cases where public interest dictating non-disclosure overrides the public interest requiring disclosure. Hence the detaining authority must fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars of those persons the authority making the order has to make necessary inquiry personally. What can be deduced from such constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved therein is against

public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If he mechanically endorses or accepts the recommendation of an outside or inferior authority in that behalf, the exercise of power would be vitiated as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power the other side may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference to a decision in the case of BAI AMINA, W/O. IBRAHIM ABDUL RAHIM ALLA VS. STATE OF GUJARAT AND OTHERS - 22 GLR 1186 held to be the good law by the Full Bench of this court in the case of CHANDRAKANT N. PATEL VS. STATE OF GUJARAT AND OTHERS 35 (1) [1994(1)] GLR 761, may be made.

Keeping in such law in mind, the order in question is considered, there is no good reason to maintain the order. Reading the order Annexure-B, it becomes clear that the District Superintendent of Police has not personally verified the report, he has mechanically accepted the same. As per the above stated law, the authority has to satisfy personally and he cannot feel satisfied on the report made by the another officer. In the case on hand, when personal verification is not made, the privilege claimed cannot be said to have been exercised rightly. In the case on hand, therefore, the detaining authority ought to have supplied the particulars regarding the persons who made the statements. As that is not done, the right to represent the case effectively is denied & marred. When that is so, the order cannot be maintained.

6. For the aforesaid reasons, the order of detention being bad in law and unconstitutional, is required to be quashed and set aside and the same is accordingly quashed and set aside. The petitioner is thereby ordered to be set at liberty forthwith, if no longer required in any

other case. Rule accordingly made absolute.

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